

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

WILLIAM MISIEWICZ,

Case No. 2:14-cv-00133-APG-PAL

Petitioner,

ORDER

vs.

DWIGHT D. NEVENS, *et al.*,

Respondents.

This habeas action by a Nevada state inmate comes before the Court on its *sua sponte* inquiry into whether the petition is subject to dismissal without prejudice because none of the claims therein have been exhausted in the state courts through to the Supreme Court of Nevada. This order follows upon a prior show-cause order (Doc. #2) and petitioner's response (Doc. #3) thereto.

Background

Petitioner William Misiewicz seeks to challenge a parole denial.

Petitioner maintains that he exhausted the claims in the federal petition in an original petition for a writ of mandamus filed in the Supreme Court of Nevada on August 27, 2013, under No. 63886. The court denied the petition on October 16, 2013, on the following basis:

This is a proper person petition for a writ of mandamus. Petitioner claims he was wrongly denied parole and seeks an order directing the parole board to release him from prison. We have reviewed the documents submitted in this matter, and without deciding upon the merits of any claims, we decline to exercise original jurisdiction in this matter. NRS 34.160; NRS 34.170. Accordingly, we

ORDER the petitioner DENIED.

² See Doc. #1, at electronic docketing page 13. The court denied rehearing on December 13,
³ 2013. *Id.*, at 15.

4 Petitioner does not rely upon any other proceeding to establish exhaustion of his
5 claims, including in his show-cause response. The online dockets of the state courts do not
6 reflect that he has pursued other proceedings presenting the claims through to a decision on
7 the merits by the state high court.

Governing Law

The Court may raise issues of exhaustion *sua sponte*. See, e.g., *Aiken v. Spalding*, 841 F.2d 881, 883 (9th Cir. 1988). Under 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust his state court remedies on a claim before presenting that claim to the federal courts. To satisfy this exhaustion requirement, the claim must have been fairly presented to the state courts completely through to the highest court available, in this case the Supreme Court of Nevada. *E.g., Peterson v. Lampert*, 319 F.3d 1153, 1156 (9th Cir. 2003)(*en banc*); *Vang v. Nevada*, 329 F.3d 1069, 1075 (9th Cir. 2003). In the state courts, the petitioner must refer to the specific federal constitutional guarantee and must also state the facts that entitle the petitioner to relief on the federal constitutional claim. *E.g., Shumway v. Payne*, 223 F.3d 983, 987 (9th Cir. 2000). That is, fair presentation requires that the petitioner present the state courts with both the operative facts and the federal legal theory upon which his claim is based. *E.g., Castillo v. McFadden*, 399 F.3d 993, 999 (9th Cir. 2005). The exhaustion requirement insures that the state courts, as a matter of federal-state comity, will have the first opportunity to pass upon and correct alleged violations of federal constitutional guarantees. See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 731(1991). A petition that is completely unexhausted is subject to immediate dismissal. See, e.g., *Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006); *Jiminez v. Rice*, 276 F.3d 478, 481 (9th Cir.2001).

Discussion

27 Petitioner, again, relies exclusively on his original petition in the state supreme court
28 in No. 63886 as the basis for exhaustion of his claims. He contends that the court reviewed

1 the merits, the clear statement in its order to the contrary notwithstanding. He further urges
2 that his claims are exhausted so long as the state supreme court had “an opportunity” to
3 consider the claims.

4 Long established law compels the rejection of petitioner’s argument. A claim is not
5 fairly presented and is not exhausted when a petitioner fails to present the claim in state
6 district court under state post-conviction procedures or in another appropriate procedural
7 vehicle but instead pursues the claim in an original petition to the state’s high court seeking
8 to invoke an extraordinary discretionary jurisdiction. See, e.g., *Ex parte Hawk*, 321 U.S. 114,
9 116 (1944); *Sweet v. Cupp*, 640 F.2d 233, 238 (9th Cir. 1981). *Accord Lindquist v. Gardner*,
10 770 F.2d 876 (9th Cir. 1985). See also *Castille v. Peoples*, 489 U.S. 346,
11 351(1989)(presenting a claim in a procedural context in which the merits of the claim will not
12 be considered, or will be considered only in special circumstances, does not constitute fair
13 presentation of the claim); *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994)(applying
14 *Castille* rule to filing of original writ in state high court).

15 In the present case, the state supreme court expressly and unambiguously both
16 declined to exercise its original jurisdiction over the extraordinary petition and stated that it had
17 not decided the merits of any claim in the petition. The petition therefore did not exhaust any
18 claims.

19 Petitioner relies upon state constitutional provisions giving the state supreme court
20 jurisdiction over an original petition and the holding in *Blair v. Crawford*, 275 F.3d 1156 (9th Cir.
21 2002), that such a petition in the state supreme court is “properly filed.” However, *Blair* held
22 only that an original habeas petition filed in the Supreme Court of Nevada constitutes a
23 “properly filed” petition for purposes of tolling of the federal limitation period under 28 U.S.C.
24 § 2244(d)(2). The question of whether a petition was “properly filed” for purposes of tolling
25 the limitation period is a distinct and different question, however, from the question of whether
26 the petition also fairly presented claims to the state courts for purposes of exhaustion. *Blair*
27 did not hold that the original petition exhausted the claims. Long established Supreme Court
28 and Ninth Circuit law instead leads to the conclusion that the petition in this case did not.

1 Petitioner's *pro se* status further does not excuse him from complying with the
2 exhaustion requirement.¹

3 **IT THEREFORE IS ORDERED** that the petition shall be **DISMISSED** without prejudice
4 for lack of exhaustion.

5 **IT FURTHER IS ORDERED** that a certificate of appealability is **DENIED**. Jurists of
6 reason would not find the dismissal of the wholly unexhausted federal petition without
7 prejudice to be debatable or wrong, for the reasons discussed herein. In the present case,
8 the state supreme court expressly and unambiguously both declined to exercise its original
9 jurisdiction over the extraordinary petition and stated that it had not decided the merits of any
10 claim in the petition. Under established law, when a state supreme court uses such clear and
11 unambiguous language in declining to exercise an extraordinary original jurisdiction, the
12 original writ petition exhausts no federal claims.

13 The Clerk of Court shall enter final judgment accordingly, dismissing this action without
14 prejudice.

15 DATED: February 14, 2014.

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18 ANDREW P. GORDON
19 United States District Judge
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28 ¹The Court notes in passing that the basis for the dismissal ordered herein is the same basis stated in
the show-cause order, i.e., that the original writ petition did not exhaust any claims.